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No. 649

IN THE

Supreme Court of the United States

October Term, 1963

DOMINICK CASTIGLIA,

Petitioner,

AGAINST

Hon. DUDLEY B. BONSAL, United States District Judge for the Southern District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioner, Dominick Castiglia, respectfully prays that a Writ of Certiorari issue to review the order denying petitioner's application for an Order of Prohibition of the trial of a pending indictment entitled "United States v. Borelli, et al" filed in the United States District Court for the Southern District of New York on August 15, 1962, insofar as petitioner is held to defend the charges in said indictment.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, U. S. C. §1254(1) and petitioner's cause is founded, in addition, upon rights secured by the Constitution of the United States and specifically the Fifth and Fourteenth Amendments thereto.

Facts

On August 15, 1962, an indictment was returned in the United States District Court for the Southern District of New York charging twenty (20) defendants, in one (1) count, with a conspiracy to violate Title 21 United States Code, Sections 173 and 174, both of which relate to the Federal Narcotics Laws. Nineteen (19) defendants are charged with their true, correct and legal names. One defendant is charged as "John Doe, a/k/a Mickey Blair, meaning thereby to describe a white male, approximately 51 years of age, 5'9", with graying black hair and dark complexion".

Petitioner, Dominick Castiglia is married and has resided at 218 Montauk Street, Brooklyn, New York for over 35 years, and also maintains a home at 44 Cousick Avenue, Newburgh, New York. Petitioner has been gainfully employed and has always conducted himself both at his home and at his employment under his name of Dominick Castiglia, and has never used the name Mickey Blair. Petitioner was not at the time of the return of this indictment 51 years of age, nor was petitioner 5'9" in height.

The only part of the description in the indictment which might be applicable to petitioner is the statement that the person sought to be charged in this indictment was a person with graying black hair and dark complexion.

Quaere: Did John Doe a k a Mickey Blair have greying black hair in 1958, when the overt act alleged was committed or in 1962, when the indictment was returned by the Grand Jury?

These descriptive characteristics are applicable to innumerable millions of persons in the United States. In addition, when this indictment was returned in August, 1962, petitioner had black hair; he did not have graying black hair. In 1958 he had black hair. At the time of his arrest in June, 1963, petitioner had graying black hair. His whereabouts and name were known to all persons who had dealings with him and his true and correct name was known to the authorities at all times from the time of the return of this indictment up to the time he was apprehended.

It is apparent, therefore, that the law enforcement officers who arrested petitioner about a year after the indictment was filed, arrived at their conclusion that petitioner was the person meant to be charged by the Grand Jury with the crime in this indictment by subjective, introspective reasoning, the basis of which is not apparent, for this decision and conclusion was reached a substantial period of time after the Grand Jury had heard the evidence, concluded its deliberations and had returned the indictment.

When petitioner was arraigned, petitioner vehemently denied to all law enforcement officers and to the Court that he was the person named in this indictment, that he was the John Doe named in the indictment, that he had ever been known under the name of Mickey Blair and he further denied knowledge of any of the other defendants in this indictment. Petifioner further denied participation in the one and only overt act charged against petifioner in this one count conspiracy indictment to wit: that in December of 1958 he was the person in the vicinity

of 180th Street and Broadway with a package on his person. These denials appear as a matter of record in the records of the law enforcement officers and the United States Attorney in connection with this proceeding. In spite of these denials and protestations petitioner was assumed to be a party-defendant and was treated as such, being held in bail and being deprived of his liberty in violation of his constitutional rights.

While confined to the Federal House of Detention in default of Fifty Thousand ($50,000.) Dollars bail, petitioner retained counsel solely for the purpose of seeking a reduction of bail so petitioner could secure his release and thereby take affirmative steps to avoid being charged in this indictment. As a result of the efforts of counsel bail was reduced to the sum of Twenty-five Thousand ($25,000.) Dollars. Petitioner was shortly thereafter released on Twenty-five Thousand ($25,000.) Dollars bail in or about July, 1963. During this time, the Government was moving the trial of this indictment. In spite of these facts, and solely upon the introspective reasoning of the law enforcement officers of the United States of America, petitioner has been held to answer the charges in this indictment without being indicted by this Grand Jury, without being the person named in the indictment and solely because petitioner, as do millions of other persons, resembles a person in the United States who could be the person meant to be charged by the Grand Jury of the crime alleged in this proceeding.

In September, 1963, approximately two (2) months after petitioner was able to secure his release from detention and imprisonment, this case was assigned for trial to Judge Bonsal, U. S. D. J. At that time petitioner had not retained counsel to defend him on the trial of this indictment and no notice of appearance had been filed on

behalf of petitioner. Petitioner immediately made application to the Court to dismiss the indictment against petitioner upon the ground that petitioner was not the person named in the indictment and for a further order inspecting the Grand Jury minutes, so as to demonstrate without question that petitioner was not the person charged by the Grand Jury as being the defendant in this indictment. The learned Court denied the application with an oral opinion, not on the merits, but solely upon the ground that the application was belatedly made, was subject to laches and was not made expeditiously. There was no ruling on the merits and the Court held this matter to be a matter of defense on the trial of this indictment, rather than a matter to be determined by the Court in advance of trial (Appendix A).

Petitioner respectfully submits that the determination of the Court requiring petitioner to answer a charge in an indictment in which petitioner is not a party defendant, is violative of petitioner's constitutional rights and petitioner should not be held to answer the charges in this indictment particularly as the minutes of the Grand Jury should demonstrate without question that petitioner is not the party sought to be charged in the indictment as the party alleged to have committed the crime alleged therein.

While this motion was pending before the Court, petitioner was advised by a number of relatives, friends and acquaintances that subpoenas had been issued by the United States Attorney for the Southern District of New York in an attempt to show that petitioner was known as Mickey Blair, the party named in the indictment as the defendant herein. Petitioner was advised a great number of the persons so subpoenaed gave statements under oath that petitioner was never known as Mickey Blair and

petitioner is advised that they stated that petitioner was not the person described in the indictment herein. Petitioner's counsel then asked that the United States Attorney submit and deliver to him in support of the motion made to the Court to dismiss the indictment and inspect the Grand Jury minutes, such evidence which would exculpate petitioner and which would demonstrate that petitioner is not the person sought to be charged in this indictment. The Court summarily denied this request and the United States Attorney refused to deliver such evidence all in violation of the defendant's constitutional rights of due process of law. A subpoena served on the United States attorney for this relief was quashed by District Judge Bonsal.

Trial of this indictment is now scheduled for November 6, 1963 and it is estimated the trial will take several months. Petitioner, Dominick Castiglia is presently on bail to answer the charges in this indictment and is being obliged to appear at the time of trial with counsel for a period of many months to defend himself in spite of his contention that he is not a person named in the indictment.

Questions Presented for Review

1. Petitioner, Dominick Castiglia is not named as a party defendant in the indictment. Petitioner, Dominick Castiglia is not the John Doe, a/k/a Mickey Blair named in the indictment, and does not fit the description in the indictment or in the caption of the indictment of the defendant sought to be charged. Should he be required to appear and defend himself against the chages of the indictment without being indicted by the Grand Jury? Does this violate his right to indictment by Grand Jury?

2. Respondent has held petitioner to answer the charges in this indictment as a party defendant. Does the extraordinary remedy of prohibition lie, there being no remedy to petitioner other than to defend on trial to show he is the wrong party charged.

3. Petitioner, Dominick Castiglia is not the person against whom evidence was adduced before the Grand Jury which returned the indictment. The Court below has refused to inspect the said Grand Jury minutes to determine this. Was such denial of inspection a denial of due process of law?

4. The United States Attorney for the Southern District of New York has evidence and information in his possession obtained as the result of the use of subpoena and otherwise, which establishes and discloses without question that petitioner Dominick Castiglia is not the John Doe, a k a Mickey Blair named in this indictment and he has refused and continues to refuse to disclose to the Court below or to the petitioner Dominick Castiglia, this evidence. Is such refusal a denial of due process of law?

Reasons for Issuance of Writ

1. The holding of the Court of Appeals raises questions of substantial importance and wide-reaching consequences and impact.

Hundreds of thousands of persons fit the description of the person sought to be charged in this indictment as the defendant therein. Should this petitioner be required to sustain the unconscionable burden of retaining counsel,

being deprived of a livelihood for many months and appearing and attending at the trial of an indictment when the indictment does not name him or otherwise identify him as the party-defendant.

An indictment is a written accusation charging commission of a crime. It is an accusation against a person not a name, and the person accused must be readily identifiable from the caption or substance of the indictment to be charged with the crime. To hold otherwise would be to subject all persons in no way charged by the Grand Jury who heard the evidence of the criminal activities involved, with the obligation of appearing and defending a criminal indictment when such persons were not intended to be charged by the Grand Jury in question. *U. S.* v. *Fawcett*, C. C. A. N. J. 1940, 115 F. 2d 764. The description of the defendant in the indictment must be sufficient to identify him. *Duffy* v. *Keville*, 16 F. 2nd 828, D. C. Mass. 1926.

Thus, when the actual name of the defendant is unknown to the Grand Jury, he must be otherwise identified within the indictment. An identification of merely "John Doe" is insufficient. *United States* v. *Doe*, 127 F. 982 (N. D. Cal. 1904), as is the name "Jane Duffy", when the defendant's true Christian name is unknown. *Duffy* v. *Keville*, *supra*. To hold otherwise, would permit the possibility that a person might be convicted when he has not been indicted by the Grand Jury.

In the instant case, the description of the defendant is patently inadequate. Subsequent to the return of this indictment, it was claimed that his true name is Dominick Castiglia. Petitioner claims he was never known as "Mickey Blair", and moreover, does not fit the description set forth in the indictment. The areas of disagreement are the defendant's age, his physical description and his alleged alias.

Under federal law, the only acknowledged instance in which a defendant may be afforded the privilege of proof that he is not the person the Grand Jury intended to indict before trial, is during the course of a removal hearing held pursuant to Rule 40, Federal Rules of Criminal Procedure. In such instance, when the Government seeks to remove a defendant to a distant district, an indictment pending against him from the distant district, *together with evidence that he is the person named in said indictment*, constitutes sufficient evidence for purposes of removal. See, *e.g.*, *United States ex rel. Porlin v. Hecht*, 48 F. 2d 90, 91 (2d Cir. 1931).

When, however, a defendant is arrested in the district in which the indictment against him is pending, his claim is apparently without pre-trial remedy, and must be presented to a petit jury as a defense of mistaken identity, unless this Court grants the relief sought herein, by the extraordinary remedy of prohibition and injunction sought herein.

At common law, an assertion that the defendant is not named in the indictment, or that he has been indicted under an incorrect name, is a defense which was raised by plea of abatement, prior to his submitting himself to the jurisdiction of the Court in any way. *United States v. Faucett*, *supra*, at page 767; *Lee v. United States*, 153 F. 948 (9th Cir. 1907). Pleas in abatement have been eliminated under modern rules, leaving this petitioner in the situation presented to this Court for review.

2. There is no apparent remedy available to petitioner other than to appear and defend at a trial projected for many months, with the unconscionable burdens and hardships of attendant thereon. Must petitioner await possible conviction to then prosecute a right of appeal to this Court to determine the questions involved herein?

Does an Order of Prohibition lie to prevent such manifest injustice in lieu of proceeding to trial, and being convicted?

The extraordinary writs of prohibition, mandamus and injunction are permitted under certain limited circumstances. Title 28, United States Code, Section 1651. These extraordinary writs, however, are to be granted only when no other legal remedy is available, and when the duty sought to be enforced is clear and indisputable. *United States* v. *Duell*, 172 U. S. 576, 582 (1899).

The writs are granted only in a situation where a Judge below has refused to perform a duty clearly required by law, or where a Court has completely exceeded its jurisdiction, and appeal would be an ineffective or impractical remedy. *Lebau* v. *Howes Leather Co., Inc.*, 352 U. S. 249, 256 (1957).

The general rule applicable to the issuance of extraordinary remedies was set forth in *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 27 (1943). That case holds that the remedies will be permitted in furtherance of normal appeal, and not for the purpose of circumvention of appeal. Thus, if a district judge exceeds his jurisdiction to the point where such extraordinary damage will be done to the petitioner before appeal may be taken, or if a Judge refuses to perform his judicial functions so that no appropriate appeal could ever be taken, the remedy would be by one of the extraordinary writs. The writs are available only to prevent a lower Court from abusing its proper functions.

The Appellate Courts have extended their appellate jurisdiction under the all writs statute, 28 U. S. C. Par. 1651 to criminal prosecutions and in *In re Cashin*, 281 F. 2d 669, assumed appellate jurisdiction by prohibition in a criminal prosecution.

CONCLUSION

For the reasons above stated it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Stenographer's Minutes—October 2, 1963

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Before

HON. DUDLEY B. BONSAL,
District Judge

* * * * *

The Court: Mr. Friedland, you made a motion on behalf of the defendant Castiglia to dismiss the indictment on the grounds that he is not the person named in the indictment as John Doe, also known as Mickey Blair, with an accompanying description, and I take it that subsidiary to your motion also was another motion to inspect the grand jury minutes—

Mr. Friedland: Yes, as a companion to that.

The Court: —for the purpose of establishing that Mr. Castiglia is not the person named in the indictment.

I have received your memorandum and I have considered it, and I have also received a memorandum from Mr. Daly in opposition.

Your memorandum indicated that the indictment was in August, 1960, but I understand it was August, 1962. I take it that was typographical, probably?

Mr. Friedland: Yes.

The Court: So it hasn't been as long a period of time as perhaps might have been indicated in your memorandum.

I also note that the defendant Castiglia, following his arrest, did make at least two motions I know about, one for reduction of bail, one for return of property.

It does seem to me that this is rather late in the day to make the motion to dismiss the indictment, in view of this past history. Moreover, the burden is, of course, on the Government to establish that Mr. Castiglia is the John Doe also known as Mickey Blair. For these reasons, Mr. Friedland, I am denying your motions, and I wanted to advise you now, so it would be a matter of record, that I had done so.

Mr. Friedland: May I point out to Your Honor that this defendant was not represented by counsel until the first pretrial conference, and his failure to make motions was due to that omission.

The Court: But he did not fail to make motions. He did make motions, as I understand it.

Mr. Friedland: There were motions made when counsel was specifically engaged for the motions only, and that was pointed out in the papers.

The Court: I understand that, but I think I will, under all the circumstances, deny your motions, and you, of course, may have an exception to that.

. . . . . .

Mr. Friedland: I have been advised that the Government has been issuing subpoenas trying to prove that Mickey Blair is my client, and I understand that some of the witnesses who have been interviewed have denied this to be the fact, and I would like Mr. Daly to supply me with copies of those reports where there is a denial of the identity of my client to be the Mickey Blair mentioned in the indictment.

The Court: All right, you made your request and it has been duly noted, and when that matter comes up, we will consider it at that time.

Mr. Daly: Your Honor, he asked for it in advance of trial. I don't know whether you heard the last part of that.

The Court: No, I am not prepared to do that, when the Government is on its proof——

Mr. Friedland: The Government is not going to produce these things and is not going to have a witness testify to this effect.

The Court: I will consider that when it comes up.

Mr. Friedland: It is not going to come up. I am asking for a discovery at this time of those documents because of the fact that the Government has just ascertained proof which will exculpate my client at this time.

The Court: All right, your motion is denied then.

APPENDIX B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of October, one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL,
Circuit Judges.

DOMINICK CASTIGLIA,

Petitioner,

v.

HON. DUDLEY B. BONSAL, United States District Judge for the Southern District of New York.

Respondent.

UNITED STATES OF AMERICA

v.

FRANK BORELLI, et al.

A petition for a writ of prohibition having been filed herein by counsel for the petitioner and argument having been had thereon,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

A true copy,
A. DANIEL FUSARO
Clerk

(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 649

DOMINICK CASTIGLIA, PETITIONER

v.

HON. DUDLEY B. BONSAL, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM SUGGESTING THAT THE CAUSE IS MOOT

In the United States Court of Appeals for the Second Circuit, petitioner sought a writ of prohibition against respondent, a United States District Judge for the Southern District of New York (R. 1–13), seeking to bar petitioner's trial. Petitioner alleged that he was not a person named or described in the indictment,[1] and that therefore respondent had no power to subject him to the burden and expense of trial (R. 1–13). On October 14, 1963, the court

[1] The indictment, which charged twenty persons with conspiracy to commit narcotics offenses, referred to petitioner in the following terms:

"JOHN DOE a/k/a MICKEY BLAIR, meaning thereby to describe a white male, approximately 51 years of age, 5'9", with graying black hair and dark complexion" (R. 4).

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of appeals denied the application for the writ of prohibition without opinion (R. 23). A petition for a writ of certiorari was filed on November 8, 1963, but was not served on the Solicitor General until December 6, 1963.

The United States Attorney informs us that the trial which petitioner sought to prohibit has already taken place, and that petitioner was convicted by a jury of the crime charged in the indictment on December 12, 1963. The instant petition is therefore moot.

Respectfully submitted.

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Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
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DECEMBER 1963.

U. S. GOVERNMENT PRINTING OFFICE: 1963